

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

FILE: B-184543

DATE: February 5, 1976

MATTER OF: American Air Filter Company, Inc.

## DIGEST:

1. Pursuant to ASPR § 1-2201(d), industrial firm becomes "planned producer" of "planned" item under DOD emergency preparedness mobilization planning program when it completes and executes DD Form 1519, "Production Planning Schedule."
2. ASPR § 1-706.1(e)(ii), which prohibits total small business set-asides where large business "planned producer" of "planned" item under DOD emergency preparedness mobilization planning program desires to participate in procurement, is valid limitation on making total set-asides necessary to protect legitimate DOD concern, and is not in contravention of Small Business Act and implementing regulations.
3. Although ASPR § 1-706.3(a), which permits withdrawal of small business set-aside prior to award if found detrimental to public interest, is largely discretionary with contracting officer and SBA, contracting officer must withdraw total set-aside on procurement for "planned" item under DOD emergency preparedness mobilization planning program where solicitation containing set-aside was issued in violation of ASPR § 1-706.1(e)(ii), which prohibits total set-aside where large business "planned producer" of item desires to participate in procurement, and bid opening has not occurred when contracting officer became aware of error.
4. Total small business set-aside on procurement of "planned" item under DOD emergency preparedness mobilization planning program becomes so established as to preclude applicability of ASPR § 1-706.1(e)(ii), which prohibits total set-asides where large business "planned producer" desires to participate in procurement of item, on date that invitation is issued.

5. Total small business set-aside is not required to be withdrawn, pursuant to ASPR § 1-706.1(e)(ii), prior to bid opening, where "planned producer" firm of "planned" item under DOD emergency preparedness planning program only achieved that status on same date that solicitation for item was issued, since firm was not "planned producer" prior to issuance date, notwithstanding that firm had expressed interest in procurement prior to becoming "planned producer" and procuring activity solicited firm to be "planned producer" after making total set-aside determination.
6. Although withdrawal of total small business set-aside pursuant to ASPR § 1-706.1(e)(ii) prior to bid opening, where large business "planned producer" achieved status on same date solicitation containing set-aside was issued, is not required, contracting officer, exercising reasonable discretion, can find sufficient detriment to public interest to justify withdrawing set-aside solely for reason that "planned producer" wants to bid, in view of specificity of ASPR § 1-706.1(e)(ii) proscription and criticalness of DOD emergency preparedness planning program. Therefore, recommendation made that contracting officer consider exercising discretion in view of various special factors.

The American Air Filter Company, Inc. (AAF), has protested invitation for bids (IFB) DAAK01-75-B-2112, issued by the United States Army Troop Support Command (TROSCOM), St. Louis, Missouri, as a total small business set-aside, for a quantity of mobile field kitchens. AAF's basic contention is that since it is a large business "planned producer" of the mobile field kitchens under the Department of the Army Industrial Preparedness Program (AIPP), it was improper for the IFB to be made a 100-percent small business set-aside. AAF relies upon Armed Services Procurement Regulation (ASPR) §§ 1-706.1(e)(ii), 1-2201(d) and 1-2206(a) (1974 ed.). ASPR § 1-706.1(e)(ii) (1974 ed.) states:

"None of the following is, in itself, sufficient cause for not making a set-aside:

\* \* \* \* \*

"(ii) the item is on an established planning list under the Industrial Preparedness Program, except that a total set-aside shall not be authorized when one or more large business Planned Emergency Producers of the item desire to participate in the procurement (but see 1-706.6 as to partial set-asides);"

ASPR § 1-2201(d) (1974 ed.) defines a "planned producer" to be:

"\* \* \*An industrial firm which has indicated its willingness to produce specified military items in a national emergency by completing an Industrial Preparedness Program Production Planning Schedule (DD Form 1519)."

Also, see ASPR § 1-302.5 (1974 ed.) to the same effect. ASPR § 1-2206(a) (1974 ed.) requires:

"solicitation of Planned Producers in all procurements over \$2,500 - of items for which they have signed industrial preparedness agreements (but see 1-706 and 1-804.1 as pertain to partial set-asides for small business and labor surplus);"

On January 28, 1975, the contracting officer at TROSCOM agreed with the Small Business Administration (SBA) that the procurement of TROSCOM's 1975 fiscal year requirement of 200 mobile field kitchens should be a total small business set-aside. At that time, there were no "planned producers" for this item. During February 1975, AAF representatives had conversations with the Director of Production and Procurement of TROSCOM, whose responsibilities apparently include procurement and solicitation of "planned producers" for the AIPP. AAF expressed interest in participating in this procurement and in possibly becoming a "planned producer" for the item.

Subsequently, TROSCOM officials decided that this item was appropriate for planning under the AIPP. The AIPP encompasses planning done by Army Materiel Command subordinate activities, such as TROSCOM, with possible producers of critical items the Army needs for mobilization in preparing for war or other national emergencies. Planning with industry is to assure capability for sustained production of essential military items to meet the needs of the United States and Allied Forces during an emergency. See ASPR § 1-2203(a) (1974 ed.). The planning is accomplished via the DD Form 1519,

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"Production Planning Schedule," signed by the Government and the "planned producer" of the item being "planned." This agreement essentially sets forth the capability of a "planned producer" to produce the required "planned" item in a certain timeframe. The agreement is not binding on either the "planned producer" or the Government as is expressly recognized in the DD Form 1519. However, the agreement does form a basis for industrial preparedness plans, current procurement plans, planning programming and budgeting. Execution of the agreement by a "planned producer" does not obligate it to accept any contract offered by the Government, nor does the Government's execution obligate it to contract with the "planned producer." As discussed below, the Government is ordinarily obligated to solicit the "planned producer" when it purchases the "planned" item.

On March 7, 1975, AAF and two other firms (both small businesses) were solicited by TROSCOM to be "planned producers" for the mobile field kitchen. AAF completed and executed the DD Form 1519 on March 28, 1975. The form indicates that the effective period covered by the planning schedule was July 1, 1975, to June 30, 1976. The form was apparently given to AAF by the Defense Contract Administration Services Region (DCASR) plant representative at AAF in St. Louis, Missouri. AAF apparently immediately executed the form and returned it to the DCASR representative. The DCASR representative then apparently delivered the DD Form 1519 to the Armed Services Procurement Planning Officer (ASPPPO) of this item at DCASR, St. Louis, Missouri. When the ASPPPO executed the form on April 1, 1975, the planning agreement was completed. On April 2, 1975, the ASPPPO returned the form to TROSCOM.

On March 28, 1975 (the same date that AAF executed the DD Form 1519), TROSCOM issued the IFB as a total small business set-aside for a firm quantity of 136 mobile field kitchens with an option of up to 64 additional units to be exercised on the date of award. This option was dependent on the availability of funds. In addition, a separate option for 300 units (a 1976 fiscal year requirement) could have been exercised within 120 days of award. Bid opening was initially designated for May 4, 1975. The Army asserts that the contracting officer has no record of any request by AAF for a copy of the IFB prior to its issuance.

Although the date of issuance indicated on the IFB was April 4, 1975, it was actually distributed on March 28, 1975. The Army has explained:

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"\* \* \*The issue date is a target based on an estimate of how long reviewing and print-shop personnel will require to perform all necessary tasks prior to formal issue of the IFB. If this process can be expedited and the IFB be issued so as to allow bidders a few extra days in which to bid, the IFB will be issued prior to the posted date. In this case, the IFB was ready for issue on 28 March 1975."

As indicated above, TROSCOM was supplied the completed AAF DD Form 1519 on April 2, 1975. Notice of this procurement was published in the Commerce Business Daily issue of April 7, 1975.

On April 8, 1975, AAF protested the total small business set-aside to TROSCOM on the grounds that it violated ASPR § 1-706(e)(ii) (1974 ed.) (quoted above), inasmuch as AAF was a large business "planned producer" which desired to participate in the procurement. AAF also protested that this procurement would not be a suitable partial set-aside because the quantity being procured was not susceptible to being severed into two or more economic production runs as required by ASPR § 1-706.6(a)(i) (1974 ed.). AAF contended that this procurement should therefore be amended so as to remove all set-asides for small business.

In response to the protest, TROSCOM extended bid opening to May 20, 1975, and later initiated withdrawal of the total set-aside, since it considered AAF's claim, as a large business "planned producer," to be a valid one. When additional funds were made available, TROSCOM found that the entire 1975 fiscal year quantity of 200 units could be purchased, and that this quantity was susceptible to being separated into two economic production runs of 100 units apiece. Consequently, on May 5, 1975, TROSCOM proposed to amend the procurement to be a 50-percent small business set-aside.

On May 6, 1975, the SBA representative at TROSCOM protested the proposed withdrawal of the total set-aside to TROSCOM, which denied the protest. On May 9, 1975, SBA requested TROSCOM to suspend the procurement pending an appeal by SBA to the Assistant Secretary of the Army (Installations and Logistics). On May 12, 1975, bid opening was indefinitely suspended. (Bid opening has not yet been re-scheduled.) By letter of May 14, 1975, SBA appealed TROSCOM's proposed action to the Assistant Secretary. By letter of June 19, 1975, the Deputy Assistant Secretary sustained SBA's appeal since he found that "\* \* \* there was no large planned producer desiring to participate in this procurement at the time of the set-aside."

Consequently, the total set-aside was reinstated, and AAF was advised of the denial of its protest on July 7, 1975. By letter dated July 16, 1975, AAF protested the total small business set-aside to our Office.

ASPR § 1-706.1(e)(ii) (1974 ed.) (quoted above) clearly provides that a total small business set-aside "shall not be authorized" when one or more large business "planned producers" of the procured item desire to participate in the procurement. In addition, ASPR § 1-2206(a) (1974 ed.) clearly requires the solicitation of "planned producers" for procurements in excess of \$2,500 of the "planned" item. In order to resolve the protest, all parties agree that two critical dates have to be established: (1) when did AAF become a "planned producer," and (2) when was the small business set-aside for this procurement so effectively established as to preclude the applicability of ASPR §§ 1-706.1(e)(ii) and 1-2206(a) (1974 ed.)?

AAF contends that ASPR § 1-2201(d) (1974 ed.) (quoted above) provides that a firm becomes a "planned producer" when it completes and executes the DD Form 1519, in this case, March 28, 1975.

However, various parties to the protest have contended, alternatively, that AAF did not become a "planned producer" until the ASPPO executed the DD Form 1519 on April 1, 1975; that AAF did not become a "planned producer" until TROSCOM (the initiating activity) was apprised of the agreement on April 2, 1975; and that AAF did not become a "planned producer" until July 1, 1975, the effective date of the agreement indicated on the DD Form 1519 executed by AAF. In support of the latter date, paragraph 2-2(c) of Army Regulation (AR) 700-90, C2, May 2, 1973 (revised September 15, 1975), is also referenced. This paragraph states in pertinent part:

"To accommodate the problems associated with varied lead times pertaining to planned items and for DOD-wide consistency in planning, production planning with industry will be based on a 3-year time frame (36-month delivery schedule). In addition, due to the need for both short-range and long-range planning data, two separate planning periods are authorized for each planned item. The first planning period will cover M-Day through M + 36 months and will begin on 1 July following the date on which the planning agreement (DD Form 1519) is signed by the contractor.\* \* \*"



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Also see section V.B.8 of Department of Defense (DOD) Directive No. 4005.1, July 28, 1972.

We believe the clear and unequivocal language of ASPR § 1-2201(d) (1974 ed.) (quoted above) establishes AAF's execution date as the date on which AAF became a "planned producer" and refutes the arguments made in support of the other "effective" dates. Also, see ASPR § 1-302.5 (1974 ed.). Although we believe it is implicit that the Government be promptly apprised of the DD Form 1519's execution (which was done here) and although the DD Form 1519 clearly contemplates the ASPPO's signature in order to be completed, the applicable regulations do not reference these dates as the "planned producer's" effective date. Rather, ASPR § 1-2201(d) (1974 ed.) specifies the effective date to be when a firm indicates its willingness to become a "planned producer" "by completing [a DD Form 1519]."

Also, we note that the delivery dates under the IFB, as initially issued, did not commence until after July 1, 1975, i.e., during AAF's planning period when it was to have the production capabilities indicated on the DD Form 1519. The planning schedule period dates referenced in the DD Form 1519 and paragraph 2-2(c) of AR 700-90 are distinct from the date of the primary decision to "plan" an item and make a firm a "planned producer." Indeed, paragraph 2.2(c) of AR 700-90 indicates that the date a "planned producer" achieves that status is the date the DD Form 1519 "is signed by the contractor."

With regard to the second question of when a set-aside becomes so effectively established as to preclude the applicability of ASPR § 1-706.1(e)(ii) (1974 ed.), AAF contends that either the IFB issuance date of March 28, 1975, or the bid opening date (which has not yet occurred) is the critical date. AAF notes that it had previously expressed a desire to TROSCOM officials to participate in the procurement (albeit prior to achieving its "planned producer" status). Also, TROSCOM, with knowledge of AAF's interest, solicited AAF to be a "planned producer" after it decided to make this procurement a total set-aside but prior to the IFB's issuance. AAF concludes that it would therefore be improper for TROSCOM to bar AAF from competition on this procurement.

The Army contends that January 28, 1975, the date TROSCOM agreed with SBA to make this procurement a 100-percent small business set-aside, was the critical date, and that since AAF became

a "planned producer" after that date, the total set-aside is proper. The Army has stated that significant administrative inconvenience and disruption of the procurement process could result if a later date were found to be the critical date in view of the considerable work that has to be done once a decision to make a set-aside is made. In addition, the Army contends that a determination to withdraw a set-aside, once it has been properly established, is within the discretion of the Army and SBA, taking into consideration such factors as detriment to the public interest due to inadequate competition or unreasonable prices.

SBA also submitted a report to our Office on this matter essentially agreeing with the Army's position. SBA also suggests that ASPR § 1-706.1(e)(ii) (1974 ed.) may be invalid since it could be considered an additional limitation on small business set-asides not sanctioned or recognized by, and imposed in contravention of, section 15 of the Small Business Act (SBA Act), Public Law 85-536, July 18, 1958, 72 Stat. 395, 15 U.S.C. § 644 (1970), and SBA's implementing regulations, 13 C.F.R. Part 127 (1975). In support of this position, SBA analogizes the present situation to that existing in Atkinson Dredging Company, 53 Comp. Gen. 904 (1974), 74-1 CPD 299, wherein we held a certain ASPR provision regarding the extent of subcontracting in total small business set-asides to be invalid because it was an impermissible infringement on SBA's exclusive statutory authority in small business size matters.

We will discuss SBA's latter suggestion here since, if correct, it would render moot the question regarding when a total set-aside is so effectively established as to preclude the applicability of ASPR § 1-706.1(e)(ii) (1974 ed.).

15 U.S.C. § 644 (1970) states:

"To effectuate the purposes of this chapter, small-business concerns within the meaning of this chapter shall receive any award or contract or any part thereof, and be awarded any contract for the sale of Government property, as to which it is determined by the Administration and the contracting procurement or disposal agency (1) to be in the interest of maintaining or mobilizing the Nation's full productive capacity, (2) to be in the interest of war or national defense programs, (3) to be in

the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government are placed with small-business concerns, or (4) to be in the interest of assuring that a fair proportion of the total sales of Government property be made to small-business concerns; but nothing contained in this chapter shall be construed to change any preferences or priorities established by law with respect to the sale of electrical power or other property by the Government or any agency thereof. These determinations may be made for individual awards or contracts or for classes of awards or contracts. Whenever the Administration and the contracting procurement agency fail to agree, the matter shall be submitted for determination to the Secretary or the head of the appropriate department or agency by the Administrator."

This statute clearly recognizes that the ultimate determination of whether to make a set-aside for small business concerns is discretionary with the agency, since the contracting officer is not required to accept a SBA recommendation that a set-aside be made for a particular procurement or class of procurements, and SBA may only appeal the matter to the head of the agency. In addition, the SBA Act's primary purpose is only to insure that small business concerns receive a "fair proportion" of the total purchases and contracts of property and services made by the Federal Government. See 15 U.S.C. § 631 (1970).

Consequently, we believe DOD may impose reasonable limitations on when a total small business set-aside can be made, if such limitations are necessary to protect legitimate DOD concerns. In this regard, SBA's own regulations at 13 C.F.R. § 127.15-2(a)(1) (1975) implicitly recognize the applicability of such ASPR provisions in stating in pertinent part:

"\* \* \* set-asides are made in accordance with provisions in [ASPR]\* \* \*"

The AIPP is the Army's implementation of the presidentially-mandated DOD emergency preparedness mobilization planning responsibility. By section 401(7) of Executive Order 11490, 34 Fed. Reg. 17567, 17570 (1969), the President directed DOD to:

"Develop with industry, plans for the procurement and production of selected military equipment and supplies needed to fulfill emergency requirements, making maximum use of plants in dispersed locations, and, where essential and appropriate, providing for alternative sources of supply in order to minimize the effects of enemy attack."

Consequently, we believe DOD issued ASPR § 1-706.1(e)(ii) (1974 ed.) as a valid limitation on making total small business set-asides necessary to protect a legitimate national defense concern of allowing large business "planned producers" an "equitable" opportunity to compete on procurements for mobilization planning items.

Also, DOD has attempted to balance its emergency preparedness mobilization planning responsibilities with its SBA Act responsibilities. Even where a large business "planned producer" desires to participate, the applicable regulations recognize the viability of partial small business set-asides in procurements for "planned" items. ASPR § 1-2208 (1974 ed.) specifically recognizes that the policy of placing a "fair proportion" of contracts with small business concerns applies to mobilization planning.

In view of the foregoing, and since we have found nothing in either the SBA Act or its legislative history which evidences an intent to limit DOD's emergency preparedness mobilization planning responsibilities with regard to the making of small business set-asides, we believe ASPR § 1-706.1(e)(ii) (1974 ed.) is valid and not in contravention of 15 U.S.C. § 644 (1970) or applicable implementing regulations. The ASPR § 1-2208 (1974 ed.) "policy" statement regarding the use of small business concerns in mobilization planning does not supersede the clear language of ASPR § 1-706.1(e)(ii) (1974 ed.). Moreover, ASPR § 1-706.1(e)(ii) (1974 ed.) has the force and effect of law since it implements Executive Order 11490, the SBA Act and the Armed Services Procurement Act of 1949, as amended, 10 U.S.C. § 2301 et seq. (1970).

Our decision in Atkinson Dredging Company, supra, held invalid the provision in ASPR § 1-701.1(a)(2)a (1973 ed.) requiring that eligibility for award under small business set-aside dredging procurements be dependent upon the use of dredges owned or obtained from small business concerns for at least 40 percent of the contract work. This decision is not applicable to ASPR § 1-706.1(e)(ii) (1974 ed.).

The ASPR provision in Atkinson Dredging Company, supra, violated 15 U.S.C. § 637(b)(6) (1970), a specific provision of the SBA Act which gave SBA exclusive and conclusive authority and responsibility to determine, for procurement purposes, matters concerning small business size. ASPR § 1-706.1(e)(ii) (1974 ed.) is not such an improper attempt to regulate small business size, but rather is a legitimate limitation on when total set-asides can be made, a matter which, as indicated above, is within DOD's authority.

With regard to the Army and SBA contentions that the decision to withdraw a small business set-aside is discretionary with the contracting officer and SBA, we agree that in the ordinary case ASPR § 1-706.3(a) (1974 ed.), which permits withdrawal of set-asides prior to award if the contracting officer finds the set-asides detrimental to the public interest, is largely discretionary. Also, it is clear that the DD Form 1519 is not a binding agreement on either the "planned producer" or the Government. Notwithstanding the foregoing, ASPR § 1-706.1(e)(ii) (1974 ed.), which has the force and effect of law, clearly provides that total small business set-asides "shall not be authorized" if a large business "planned producer" desires to bid. There is no provision in this requirement allowing for discretion on the part of the procuring activity. Therefore, if bid opening has not occurred when the contracting officer is made aware of the erroneously established total set-aside, the procuring activity is required to withdraw a total set-aside contained in a procurement in violation of this requirement.

As to the question of when a total small business set-aside becomes so established as to preclude the applicability of ASPR § 1-706.1(e)(ii) (1974 ed.), it is our view that the critical date is the date of the issuance of the IFB, i.e., in the present case, March 28, 1975. See B-154172, July 14, 1964. Cf. B-143426, October 6, 1960. We believe that in order to clearly ascertain the critical date, ASPR § 1-706.1(e)(ii) (1974 ed.) should be read together with ASPR § 1-2206(a) (1974 ed.) (quoted above). ASPR § 1-2206(a) (1974 ed.) requires the "solicitation of Planned Producers" (emphasis supplied). Obviously, soliciting a "planned producer" necessitates the issuance of a solicitation or some other positive communication between the contracting officer and the "planned producer." It follows that the IFB issuance date is the critical date since a large business "planned producer" can only express a desire to participate in a procurement if it has been solicited or otherwise notified of the procurement's existence.

Moreover, ASPR § 1-2206(a) (1974 ed.) does not limit its application to procurements where a "planned producer" achieved that status prior to the agreement of the contracting officer and SBA that a total set-aside be initiated. Consequently, the date of the SBA-TROSCOM interagency agreement in this case, which was not a matter of public knowledge, cannot be regarded as the critical date, since a procurement does not become a reality until a solicitation is issued or interested firms are otherwise invited to participate.

We recognize that some language in 42 Comp. Gen. 108, 111 (1962) (cited by the Army), which also involved a large business "planned producer's" exclusion from competition, implies that ASPR § 1-706.1(e) (ii) (1974 ed.) is not applicable once the contracting officer agrees with SBA that a total set-aside should be made. However, the relied upon language was not necessary to the outcome of that case. The large business "planned producer" excluded there did not become a "planned producer" until after the IFB's issuance and was not designated a large business until after bid opening. We held that although the contracting officer had the discretion to withdraw the total set-aside under the circumstances of the case, he was not required to do so under the applicable ASPR provision then in force (the predecessor of ASPR § 1-706.1(e)(ii) (1974 ed.)). 42 Comp. Gen., supra, is modified insofar as it may be inconsistent with this decision.

In addition, in B-154172, supra, issued subsequent to 42 Comp. Gen., supra, the IFB issuance date was clearly regarded as the critical date. We concurred with the Navy that cancellation of an IFB was required by the applicable ASPR provision because the procurement was issued as a total small business set-aside although there was a large business "planned producer" existing prior to the date of the IFB's issuance, the existence of which the contracting officer was unaware when the IFB was issued.

Also, in B-143426, supra, which concerned the applicability of the very similar ASPR provision (the predecessor of ASPR § 1-706.1(e) (iii) (1975 ed.)) prohibiting total small-business set-asides on procurements of items on qualified products lists (QPL) where a large business listed on the QPL desires to participate, we held that an IFB calling for a QPL product was improperly issued as a total small business set-aside, since a large business on the QPL had expressed a desire to participate in the procurement prior to the issuance date. In view of this violation of an ASPR requirement and since the bids submitted by the small business firms were considered unreasonably high, the procurement was properly canceled after bids had been opened and the requirement resolicited.

Considering the nonpublic nature of a "procurement" prior to the issuance of a solicitation, we do not regard the possible administrative inconvenience, which may occur in the relatively few cases where a large business firm becomes a "planned producer" or a "planned producer" becomes a large business during the period extending from the contracting officer's decision that a total set-aside be instituted to the IFB's issuance date, to be sufficient reason to justify barring a firm or class of firms from competing on a procurement.

Also, we do not believe the bid opening date should be regarded as the critical date. As indicated above, this TROSCOM requirement actually became a procurement when the IFB was issued. Also, ASPR § 1-2206(a) implies a "cut off point" at the time bids are solicited, after which there would be no compulsion on the procuring activity to solicit large business "planned producers" which achieve that status after issuance. We do not believe an otherwise authorized procurement, once issued, becomes an unauthorized procurement because of the subsequent creation of a large business "planned producer." Moreover, there is a considerably greater possibility of disruption to the procurement process if actions which occur subsequent to an IFB's issuance could compel the withdrawal of a set-aside. Under such circumstances, especially prior to bid opening, where a large business becomes a "planned producer" or a "planned producer" becomes a large business after the issuance of an IFB containing a total set-aside, we believe it should be discretionary with the contracting officer as to whether he should withdraw the set-aside so that he may consider other factors, such as detriment to the public interest, in deciding whether such a withdrawal would be merited. See 42 Comp. Gen., supra. Cf. 37 Comp. Gen. 147 (1957); B-144080, October 26, 1960.

Since the IFB issuance date, i.e., March 28, 1975, is the critical date and since AAF was not a "planned producer" prior to that date, we cannot conclude that the total set-aside was not authorized. Although AAF had expressed interest in participating in this procurement to TROSCOM officials some months prior to the IFB's issuance (after TROSCOM had decided to make the procurement a total set-aside), AAF was not a "planned producer" (nor had it even been solicited to be a "planned producer") at that time. These conversations and the subsequent solicitation of AAF to be a "planned producer" do not legally compel TROSCOM to withdraw the total set-aside since AAF did not become a "planned producer" prior to the IFB's issuance. In this regard, we note that AAF was in no way required to execute the DD Form 1519.

Moreover, the contracting officer denies having any knowledge (and there is no probative evidence to the contrary) of AAF's desire to participate in this procurement prior to the IFB's issuance or of AAF's impending "planned producer" status. Therefore, TROSCOM is not legally compelled to withdraw the total set-aside.

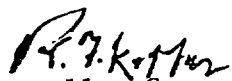
However, as indicated above, in view of the specificity of the ASPR § 1-706.1(e)(ii) (1975 ed.) proscription against total set-asides and the criticalness of the DOD emergency preparedness planning program, it would ordinarily be within the reasonable exercise of the contracting officer's discretion to find the total set-aside detrimental to the public interest and have it withdrawn solely for the reason that a large business "planned producer" desires to participate in the procurement, especially where bid opening has not occurred. This would be true even if that firm had not achieved that status prior to the IFB's issuance.

Consequently, we recommend that the contracting officer again consider whether the circumstances are such that withdrawal of the total set-aside would be justified under ASPR § 1-706.3(a) (1975 ed.), and, if the answer is affirmative, whether a partial set-aside would be justified under ASPR § 1-706.6 (1975 ed.). In this regard, we note that the decision of the Deputy Assistant Secretary was apparently based solely on his "legal" determination that AAF was not a "planned producer" when the set-aside was established so that withdrawal of the set-aside would be improper. In addition to our contrary finding that withdrawal of the total set-aside could be reasonably within the contracting officer's discretion, there are several other special factors extant which were apparently not considered in reversing TROSCOM's decision to withdraw the total set-aside. These factors include the length of time which has passed since the IFB's issuance, the extremely close timeframe between AAF's achieving its "planned producer" status and the IFB's issuance, TROSCOM's prior knowledge of AAF's interest in participating in this procurement, TROSCOM's solicitation of AAF to be a "planned producer" during the formulation of this procurement, and the effect of excluding AAF from this procurement on the viability of its "planned producer" status. Obviously, SBA has the right to disagree with any such determination by the contracting officer to withdraw the total set-aside, in which case this matter could again be referred to the Assistant Secretary for his decision pursuant to ASPR § 1-706.3(e) (1975 ed.).



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In any case, we do not believe the 1976 fiscal year quantity (an option for 300 mobile field kitchens under the IFB as initially issued) may be procured on a total set-aside basis in view of the ASPR § 1-706.1(e)(ii) (1975 ed.) prohibition.

  
Deputy Comptroller General  
of the United States